United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-1210

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

AL TAYLOR, WILLIAM TURNER, CHARLES RAMSEY, RUFUS WESLEY, HENRY SALLEY and AL GREEN, :

Appellants. :

- X

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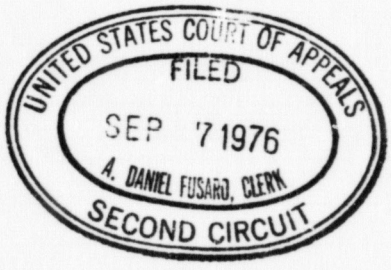
P/S

On appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT RUFUS WESLEY .



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BRIEF FOR APPELLANT RUFUS WESLEY

PRELIMINARY STATEMENT

Rufus Wesley (referred to as "Folks") was one of seventeen indicted co-conspirators and fifty-five unindicted co-conspirators charged with conspiracy to violate federal narcotics law [21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)]. He was also charged with two of the thirteen substantive charges under the same law and 18 U.S.C. §2 (aiding and abetting) along with the other defendants. Thirteen of the defendants went to trial which was to last for two months in the Southern District of New York before Judge Kevin T. Duffy and a jury. Before evidence was adduced, however, the case of Warren Robinson, a key conspirator, was severed leaving twelve defendants. The jury acquitted one defendant (Bryant Ferguson), did not reach a complete verdict on four defendants (Ernestine Barber, Arhelia Miller, Cecil Tate and Walter John Smith) and convicted the other seven defendants. Wesley was

convicted on the conspiracy count and one substantive count (count five). He was acquitted on substantive count four.

On May 7, 1976, he was sentenced to eight years in the penitentiary on each count to run concurrently (JA-8).

QUESTIONS PRESENTED

1. Whether the defendant Rufus Wesley, tried initially with twelve other co-defendants, was deprived of his Sixth Amendment right of trial by jury for the following reasons:

A. His attorney protested his right to exercise any peremptory challenge to the panel on the grounds that the decision concerning peremptory challenges was a joint decision and she (his attorney) was out-voted or out-maneuvered on each peremptory challenge. Moreover, defense counsel's decisions were exercised by a chief counsel who represented a co-defendant (Warren Robinson) who was objected to as chief counsel by all other defendants on grounds that Robinson's case should have been severed. Before evidence was adduced and on motion of the government, the case was severed and the jury, chosen primarily by counsel for Warren Robinson, heard the case.

B. No peremptory challenges were granted any defense counsel to the alternate jurors as required by F.R.C.P. 24(c) and three alternate jurors became members of the jury. Two participated in the final deliberations. Counsel made timely objection.

C. The court refused to make any inquiry of the jury panel on the general background issues of education, and/or children on voir dire inquiry after repeated request.

D. The court during jury deliberation, out of the presence of the defendant and his counsel and over objection, communicated with individual jurors. A record of one such communicationswas made and sealed. Neither defendant nor counsel know its contents.

2. Whether there was misjoinder of defendants where the evidence revealed as a matter of law at least two if not more separate conspiracies involving a claimed seventy-two conspirators and where the evidence supposedly connecting other defendants to the conspiracy was highly prejudicial.

A. In this regard defendant contends that the court's instructions contributed to the prejudice and the rules of this Court re multiple conspiracies were violated.

3. Whether under the facts of this case improprieties on the part of the prosecutor did not mandate a mistrial.

4. Whether the trial court abused its discretion in permitting inquiry, over objection, of the principal witness against defendant Wesley as to whether or not that witness and the defendant had "an agreement" to distribute narcotics. This was the ultimate issue for the jury (on conspiracy) and the witness should have been asked to tell what the conversations were.

5. Whether the defendant was denied his constitutional right to be present at his trial in violation of F.R.C.P. 43 because of an unjustified arrest and detention by federal officials in Washington, D.C. for a period of three days when he was absent during the trial. Upon his return he did not waive his right to be present.

6. Whether under points raised by co-counsel for defendants similarly situated to Rufus Wesley, he was not denied his right to a fair trial.

STATEMENT OF THE CASE

The defendant, Rufus Wesley, was connected in the indictment to the narcotics conspiracy in four of thirty-seven alleged overt acts and by two of the fourteen substantive charges. The indictment charged that the conspiracy commenced "in the Southern District of New York and elsewhere" on January 1, 1969 and continued thereafter until December 6, 1973. Wesley had been indicted in a previous case, United States v. Tramunti, 513 F.2d 1087 (1975) under the name of "John Doe a.k.a. 'Folks'." He was not, however, one of the defendants tried in that case (JA-483).

Under Count I of the indictment in the case at bar (the conspiracy count), Wesley was charged along with all the other named defendants as a conspirator. He was named in overt acts 7, 8, 9 and 14 (JA-15-17).

Overt Act 7 charged that "In or about August 1971, defendant RUFUS WESLEY a/k/a 'Folks', and co-conspirator Warren Robinson a/k/a 'Alan', cut and packaged approximately one-half of a kilogram

of heroin in Washington, D.C." (JA-17).

Overt Act 8 charged that "In or about August 1971, defendant RUFUS WESLEY a/k/a 'Folks' and co-conspirator Warren Robinson a/k/a Alan received approximately one-half of a kilogram of heroin in the vicinity of Co-op City, Bronx, New York" (JA-17).

Overt Act 9 charged that "On or about September 1, 1971, RUFUS WESLEY a/k/a 'Folks' transported approximately one-half of a kilogram of heroin from Bronx, New York to Washington, D.C." (JA-17).

Overt Act 14 charged that "In or about October 1971, defendant RUFUS WESLEY transported one kilogram of heroin from Ridgefield Park, New Jersey to Washington, D.C." (JA-18).

The substantive counts 4 and 5 charged Wesley with distribution and possessing narcotics "in or about August, 1971" along with Robinson[1] and "on or about the 1st of September 1971" unlawfully distributing and possessing narcotics.[2] (JA-23).

By stipulation, the defendant Wesley was deemed absent from any relevant jurisdiction after September 1972 (TR 3495; JA-433). Most of the evidence adduced concerned events centered around the Washington, D.C. area and Ridgefield, New Jersey, from the middle of 1971 through early 1973.

There was no testimony whatsoever connecting the defendant Wesley to the following indicted co-conspirators: Al Taylor,

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1. Wesley was acquitted of this charge.

2. Wesley was convicted of this count along with the conspiracy count.

William Turner, Bryant Ferguson, Charles Ramsey, Dorothea Ann Ellis, Walter John Smith, Cecil Tate, Henry Salley, Joseph La Salata, Ernestine Barber, Basil Hansen, Al Green, Arhelia Miller or Ronald Sweeney (TR 3108; JA-437). Harry Pannirello, an unindicted co-conspirator, testified that he remembered clearly one encounter with defendant Wesley (TR 2214) and thought he may have had two or three more meetings (TR 1962). Thomas Dawson, who said he met defendant Wesley early in 1971, testified that Robinson, Wesley, and he had an "agreement" to purchase and distribute narcotics (TR 182; JA-373) from the middle of 1971 through some time in 1972 when Wesley became unreliable and they no longer dealt with him. On its face the evidence was most peculiar since, according to Dawson, Wesley's only source of income was working for him (Dawson) in a bar in Baltimore and Warren Robinson sold and distributed the bulk of all the narcotics (95%) (TR 142, 177). There was no testimony explaining how Wesley was connected by way of conspiracy or otherwise to all the others whose names and activities were described throughout two months of testimony.

Testimony was adduced in great detail and exhibits of narcotics were introduced in evidence concerning an attempted arrest of Basil Hansen in Bronx, New York on October 5, 1973 (TR 2573-2586; JA-414-418) and an arrest of Walter John Smith, a pharmacist, in Washington, D.C. in August 1971 (TR 675-793). There was no connection whatsoever made in the testimony between these incidents, the defendant Wesley or any narcotics conspiracy which might involve him. Dorothea Ann Ellis testified about her use and connection

to cocaine and an arrest connected with cocaine and Dawson in Washington in June of 1971, and other illegal activities involving cocaine (TR 1544). There was evidence of a number of narcotics transactions centering around the apartment of Ernestine Barber in the Bronx, about narcotics transactions in Silver Springs, Maryland involving Arhelia Miller and Dorothea Ann Ellis, about Warren's men's shop in Washington, D.C. and narcotics transactions there. No testimony connected Wesley to any of these activities.

Dawson testified that he made an agreement to go into the narcotics business in February 1971 at Warren's Men's Store in Washington, D.C. with Warren Robinson and Paul Gregorio when he lent or advanced "Paulie" $2200 (TR 91, 94). At about the same time Dawson met Wesley to whom he gave a job at "Boot's Playroom", a bar in Baltimore, Maryland (TR 106, 126, 128).

In the spring and early summer, Dawson said he started making trips to New York to pick up narcotics and on one of those occasions took Wesley with him (TR 139).

Wesley made more trips to New York with Dawson to obtain narcotics (TR 157) and in July or August of 1971 moved, with Dawson's help, to an apartment in Landover, Maryland (TR 169, 170).

At some point that summer, Dawson entered into "an agreement" with Warren Robinson and Wesley presumably to obtain, prepare and sell narcotics (TR 183-186, 264, 266, 267; JA-374-378, 383, 384).[3]

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3. Defense counsel repeatedly objected to this question, put in conclusory form as it was. Nonetheless, Dawson never actually said what the agreement was -- only that he had an agreement. To a lay jury, however, this was sufficient evidence to find an illegal agreement -- a conspiracy -- and they did so when they found Wesley guilty on Count I.

In early August 1971, Wesley accompanied Dawson to New York to Co-op City where Dawson met Harry and John Pannirello and obtained a half kilo of heroin and they returned to Wesley's apartment in Maryland where they prepared the narcotics for street sale (TR 202). Thereafter, Dawson said, it was "routine" for him to go to New York with Robinson and Wesley for narcotics (TR 202-204, 207).

On a last trip to Co-op City in August 1971, Dawson discussed moving their meeting place to New Jersey (TR 207). Then in August or September Dawson and Wesley went to New Jersey to obtain narcotics from Harry and John Pannirello (TR 217, 218). After a while, Dawson stopped going to New Jersey and Warren Robinson, Wesley and a person called "Mouthpiece" went there to secure narcotics (TR 242-244). Also about that same time, Dawson entered into a partnership in narcotics with James March (Bubbles). Also about that time Robinson told Dawson that Wesley was using narcotics and he didn't participate further in their narcotics activities (TR 245).

Harry Pannirello testified in supposed corroboration of Dawson's testimony about Wesley that he met him (Wesley) "one or three times" at the end of 1972 (TR 1962, 1964, 2407, 2408).[4]

Dawson as a witness demonstrated a particularly unsavory character. He had spent about thirteen years in jail intermittently between the ages of 21 and 40 (TR 418, 68, 69; JA-189, 190). Dawson had pleaded guilty to conspiracy to deal in narcotics in a

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4. This was no corroboration at all since by stipulation with the government, Wesley was out of the jurisdiction (incarcerated in jail) from September 1, 1972 to the end of the conspiracy (TR 3495; JA-433).

case similar to the case at bar (the Tramunti case -- see infra) (TR 457) and the two important people in that conspiracy were himself and Warren Robinson (TR 451, 452). Although at first he denied it, he later admitted he was an informant and cooperating with the government for a long period when he, himself, was dealing in narcotics (TR 329, 330, 508, 51[illegible], 512). He admitted that he made a "substantial" amount of money in narcotics in 1971 ($28,000 on every kilo [TR 494]), but could not say how much (TR 401, 402). In 1969 and 1970 he cooperated with the government and received a $2,000 reward for information on a post-office robbery (TR 538; JA-197). He described himself as an agent working for the federal government at that time (TR 2992, 2994, 2995; JA-198, 199). In 1970 and 1971 Dawson was almost a full-time safe cracker ("cracked them" as often as he could find one) (TR 481-483; JA-193). Dawson admitted proudly to having "terrorized Washington [D.C.] and Maryland" during that time (TR 485). He contradicted himself and changed his testimony on a number of issues while he was on the witness stand (TR 330, 508, 512; 477, 478, 481; 2992, 2994, 3003, 3004, 3008, 3010) and was altogether a person unworthy of belief.

The jury deliberated for five days before reaching its verdict on eight of the twelve defendants.

POINT I

THE DEFENDANT WESLEY WAS DENIED HIS SIXTH AMENDMENT RIGHT OF TRIAL BY JURY BY REASON OF THE RULINGS AND CONDUCT OF THE TRIAL COURT.

At the outset of the trial, the court appointed Ivan Fisher, attorney for co-defendant Warren Robinson, as chief counsel and spokesman for the twelve other defense counsel. This took on special significance because Warren Robinson had been tried and found guilty of conspiracy in the Tramunti case [United States v. Tramunti, 513 F.2d 1087 (2 Cir. 1975)] -- evidently considered by the government to be the same conspiracy as the one involved in the case at bar (JA-483, 486). In the instant indictment Warren Robinson was charged with being the managing, supervising conspirator (21 USC §848) (JA-22) -- a crime which would bring on a guilty finding, a penalty of life imprisonment. Early in the proceedings other defense counsel objected to Mr. Fisher's designation as chief counsel and sought along with him the severance of his client from the others (TR 12, 13; JA-344, 345; TR 272; JA-369). On numerous occasions Mr. Fisher announced that he would open to the jury with a statement that his client would admit the conspiracy and implicate others (TR 29, JA-348; TR 71, 72, 74, JA-348-350; TR 88, 89, 91, JA-353, 354, 356; TR 203-206, JA-360, 361). It was as though there were another prosecutor in the ranks of defense counsel (TR 306, JA-361). These colloquies with the court proceeded at a time when the court was inquiring on voir dire of the jury panel and counsel was selecting the jury.

The court had initially filled the jury box with sixteen

persons and had announced to counsel that there would be sixteen peremptory challenges for defense counsel to be exercised "across the board" (TR 13, 14, JA-340, 341).[5] Sixteen peremptory challenges were made on behalf of defendants, all by Mr. Fisher who then told the court that the jury was "satisfactory to the defendant" (TR 260, JA-362). At this juncture objection was made by defendant Wesley to the manner in which the peremptory challenges had been exercised (TR 268-271, JA-365-368); counsel stated she had one peremptory that the defendant wished to exercise and the opportunity to do so on the defendant's behalf was denied to her.[6] Counsel for Wesley and other counsel also objected on the grounds that the court was obliged to grant them two peremptory challenges to be exercised separately to the four alternate jurors under F.R.C.P. 24(c) (TR 264, JA-364, TR 272, JA-369). That rule states:

> "(c) ALTERNATE JURORS. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror

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5. The record indicates that counsel for defendant Wesley was out of the courtroom at the time the court made its announcement (TR 15, JA-342).

6. That juror was later identified as Juror No. 3 about whom there was another incident (TR 284, JA-372). See infra.

> shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

The court denied defense counsel's request in all respects and the trial proceeded (TR 272, JA-369).

Defendant Wesley's counsel had submitted written questions to be asked of all jurors prior to the court's commencement of the voir dire (JA-338, 339). Among the questions requested were the educational background of all prospective jurors and whether or not they were parents of children and information concerning such children (TR 84, JA-351; TR 74, JA-350; TR 122, 123, JA-358, 359). Despite repeated requests of counsel for such information, the court refused to ask the questions (TR 123, JA-359).

During the deliberations of the jury which lasted for five days, the court had occasion to speak privately to two of the jurors. One such incident disturbed defense counsel greatly and objection to the inquiry was made of the court and counsel requested information as to what had transpired. The court refused to say what had taken place. Upon motion of the government, however, the court consented, after the fact, to make a record privately of what had occurred and thereafter sealed the record (TR 4298-4305, JA-180-187; TR 4333, JA-188).

It is contended by defendant Wesley that each incident described above, viewed by itself, and in conjunction with the

others, deprived him of his Sixth Amendment right to a jury trial under the Constitution.

In 1894, the Supreme Court had occasion to discuss the importance of the peremptory challenge as part and parcel of that right in Pointer v. United States, 151 U.S. 396, 408, 409 (1894):

> "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. 'The end of challenge,' says Coke, 'is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.' 3 Inst. 27, c. 2. He may, if he chooses, peremptorily challenge 'on his own dislike, without showing any cause;' he may exercise that right without reason or for no reason, arbitrarily and capriciously. Co. Lit. 156b; 4 Bl. Com. 353; Lewis v. United States, 146 U. S. 376. Any system for the empanelling of a jury that presents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice."

See United States v. Marchant, 25 U.S. 480, 482 (1827). Said the Court in Marchant:

> "[Blackstone] puts it [right of peremptory challenges] on the ground that the party may not be tried by persons against whom he has conceived a prejudice or who, if he has unsuccessfully challenged them for cause, may on that account, conceive a prejudice against the prisoner.

Cf. St. Clair v. United States, 154 U.S. 134, 148 (1894).

In 1965 the Supreme Court again affirmed the importance of the peremptory challenge in Swain v. Alabama, 380 U.S. 202, 218-221 (1965):

"In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376. Although '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' Stilson v. United States, 250 U.S. 583, 586, nonetheless the challenge is 'one of the most important of the rights secured to the accused,' Pointer v. United States, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, supra; Harrison v. United States, 163 U.S. 140; cf, Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' Lewis v. United States, supra, at 378.

"The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."' In re Murchison, 349 U.S. 133, 136. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. . . .

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. Hayes v. Missouri, 120 U.S. 68, 70. It is

> often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' Lewis, supra, at 376, upon a juror's 'habits and associations,' Hayes v. Missouri, supra, at 70, or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' Lewis, supra, at 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the voir dire, by both prosecutor and accused, Miles v. United States, 103 U.S. 304; Aldridge v. United States, 283 U.S. 308. This Court has held that the fairness of trial by jury requires no less. Aldridge, supra. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." (Footnotes omitted.)

The trial court below interfered with counsel's right to peremptory challenge in more than one way. By requiring the peremptory challenges to be exercised jointly and by designating an attorney who represented one defendant whose interests were diametrically opposed to all the other defendants, the spokesman for all the defendants, the court effectively deprived at least the defendant Wesley of the right to exercise any peremptory challenges to the 12 jurors who were about to be impaneled.

The trial court then went further in its arbitrary denial of the right of peremptory challenge to the defendants. It deprived them of any challenge to the four alternate jurors who were put in the box. The court so ruled despite the clear and unequivocal language of F.R.C.P. 24(c) which states:

> "Each side is entitled to 2 peremptory challenges in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. . . . The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror." (emphasis supplied)

Moreover the section itself (Rule 24(c)) was particularly called to the court's attention (TR 272, JA-369) but the court nonetheless refused to follow the rule. That error then operated to deprive defense counsel -- and all of them -- of any right to peremptory challenge to the two alternate jurors who finally sat in on the deliberations and found the defendants guilty (TR 770, 1821-1827, 2335; JA-387, 399-405, 409).

In addition to this outright denial of any peremptory challenge to the alternate jurors, the court refused express request to inquire into the backgrounds of the venire panel in certain important respects. Defendant Wesley specifically requested information on the educational background of each prospective juror as well as information about any children (TR 74, 122, 123; JA-350, 358, 359). Again the court arbitrarily refused to make inquiry, further impairing the full exercise of peremptory challenge to the defendants. The right to inquire into a juror's qualifications to sit is part of the right to exercise the peremptory challenge. See Kreuter v. United States, 376 F.2d 654, 656, 657 (10 Cir. 1967); People v. Boulware, 29 N.Y.2d 135, 142 (1971); Haith v. United States, 231 F.S. 495, 498 (E.D. Pa. 1964) aff'd. 342 F.2d 158 (3 Cir. 1964); cf. Pinkney v. United States, 380 F.2d

882 (5 Cir. 1967) cert. den. 390 U.S. 908 (educational background was available to defense counsel); United States v. Dellinger, 472 F.2d 340, 336-338 (7 Cir. 1972). Said the Seventh Circuit in Dellinger:

> "If this right [right to peremptory challenge] is not to be an empty one, the defendants must, upon request be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." (at p. 338).

Finally, the trial court interfered with defendant's right to due process of law when it communicated with individual jurors during their deliberations out of the presence of the defendants or their counsel and in violation of F.R.C.P. 43 as will be discussed in more detail infra Point V.

POINT II

WHERE THE EVIDENCE ESTABLISHED MULTIPLE CONSPIRACIES SUPPOSEDLY INVOLVING SEVENTY-TWO SEPARATE CO-CONSPIRATORS, MOST OF WHOM WERE NOT CONNECTED TO DEFENDANT WESLEY, THERE WAS A FATAL MISJOINDER OF DEFENDANTS UNDER THE RULE OF UNITED STATES v. BERTOLOTTI, 529 F.2d 149 (2 CIR. 1975).

As set forth in the "STATEMENT OF THE CASE" supra, the defendant Wesley was charged with involvement in a single narcotics conspiracy which involved seventy-one other supposed co-conspirators. There were no common headquarters of the supposed conspiracy and its members, if indeed they could so be called, had quite a number of different locations in New York, New Jersey, Washington, D.C. and Maryland where narcotics activities were pursued -- nor did there appear to be any mutual dependence of the members of this

conspiracy on each other nor even one kind of narcotics dispensed (cocaine was used and sold by the so-called conspirators as well as heroin). Moreover there was no testimony that they all knew one another or worked together on a common scheme, partnership or plan. See United States v. Mallah, 503 F.2d 971, 976 (2 Cir. 1974).

The main witness against Wesley was Thomas Dawson who was a self-styled major operator in the so-called conspiracy. He described Wesley as a go-alonger for a short time in a criminal conspiracy or partnership that involved himself, Warren Robinson and at one point a man called "Mouthpiece." According to Dawson, that was the conspiracy and it involved no others except Harry and John Pannirello from whom they obtained the narcotics; nor did the government even prove that the Pannirellos were the only "source" of the narcotics involved. A great deal of testimony was adduced about a number of charged co-conspirators who frequented "Warren's Men Shop" in Washington, D.C. No connection to Wesley and any of these people was established in the evidence.

The other witness who testified about Wesley and narcotic activities was Harry Pannirello who could not remember clearly more than one occasion that he saw Wesley; that time was in New Jersey and Pannirello could not remember whether or not any narcotics transaction then took place (TR 1962, 1963, 1922, 2090). Although counsel stipulated that Pannirello would identify Wesley, Pannirello was unable to pick out or identify Wesley in the court room (TR 1893, 1894).

There was certainly no evidence of a continuing theme, modus

operandi, or cast of characters in this so-called conspiracy -- it or they (the conspirators) were not "highly structured, disciplined or vertically integrated". Compare United States v. Sisca, 503 F.2d 1337, 1345 (2 Cir. 1974).

Days of testimony were given over to describing the attempted arrest of Basil Hansen on October 5, 1973, his escape from the hands of the police and the vast quantities of narcotics found in his apartment (TR 2573-2587, 2861, JA-414-418, 421). Similarly the only other introduction into evidence of tangible narcotics concerned an incident in August 1971 in Washington, D.C. and the arrest of defendant Walter John Smith under circumstances not related to any other defendant or supposed co-conspirator's activities (TR 2586, JA-418).

All of this evidence could not help but be prejudicial to defendant Wesley even though not specifically connected to him. Moreover the jury was not adequately instructed on the issue of single and multiple conspiracies. Defendant Wesley offered a written instruction, No. 9 (JA-444) which told the jury his contention that "if you believe the Government witnesses and accept the Government's theory of the facts, at least two conspiracies have in fact been proved. The first is a conspiracy among Paul Gregario, Dawson and Robinson to deal in narcotics. A second conspiracy is one among Ellis and others to deal in cocaine. A third conspiracy involves Basil Hansen and Hattie Ware; a fourth conspiracy defendant Smith and others."[7]

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7. Defendant Wesley was expressly given an exception to the court's instructions for failure to include any of the material in the proposed written instructions submitted (TR 3559, JA-439).

Instead the trial court did not marshal the evidence at all. (The court's marshaling of the evidence in United States v. Tramunti, 513 F.2d 1087, 1107 (2 Cir. 1975) was commented on and expressly approved by this Court.) As has been pointed out, the Tramunti case involved many of the same persons as the dramatis personae in the case at bar. Harry Pannirello, Thomas Dawson, Warren Robinson, Henry Salley, Al Green and Basil Hansen were all part of the Tramunti case and Judge Duffy presided at that trial also.

Moreover the trial court in the case at bar did not advise the jury that they must acquit the defendants if they found multiple conspiracies where only one conspiracy was charged, as was required. Although this Court in United States v. Calabro, 449 F.2d 885 (2 Cir. 1972) cert. den. 410 U.S. 926 (1973) said such an instruction was not always necessary, under the facts of this case it was required. The court below told the jury:

> "They [the defendants] argue that no conspiracy existed or if, in fact, one did exist, then at best the evidence shows several separate and independent conspiracies involving various groups.
>
> "Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges." (TR 4170, JA-68) (emphasis supplied)

What this instruction meant to the jury was -- they could convict any defendant even if they found multiple conspiracies if they found him or her guilty of belonging to one of them!

This is not consistent with the law this Court has been particularly concerned with in recent months on the issue of

conspiracy. In United States v. Bertolotti, 529 F.2d 149, 154 (2 Cir. 1975) this Court said:

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed."

Moreover in Bartolotti this Court said that this Circuit "has gone quite far in finding single conspiracies in narcotics cases." The case that heads that list is the Tramunti case -- supposedly the same conspiracy as the case at bar.

It is to be recalled that this indictment and prosecution was brought with the government clearly on notice of what this Court said in United States v. Sperling, 506 F.2d 1323, 1340 (2 Cir. 1974):

> "In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeal before this Court . . . we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. . . .
>
> ". . . many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge which can prove seriously detrimental to the government itself. . . ."

In Sperling, Judge Pollack below, just as Judge Duffy in Tramunti, marshalled the evidence, focusing the jury on the charges and the role of each defendant in the conspiracy. Moreover, Judge Pollack gave the charge requested in the instant case, and refused by Judge Duffy, to wit:

> ". . . if the government 'has failed to prove the existance of only one conspiracy, you must find the defendants not guilty.'" (p. 1341)

This case is haunted by the dicta and holdings of the Supreme Court and this Court in a host of decisions other than Bertolloti re conspiracy: Berger v. United States, 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Agueci, 310 F.2d 817 (2 Cir. 1962) cert. den. 372 U.S. 959; United States v. Sperling, 506 F.2d 1323 (2 Cir. 1974); United States v. Mallah, 503 F.2d 971 (2 Cir. 1974), cert. den. 420 U.S. 995; United States v. Miley, 513 F.2d 1191 (2 Cir. 1975); United States v. Borelli, 336 F.2d 376 (2 Cir. 1964), cert. den. sub nom Cinquegrano v. United States, 379 U.S. 960 (1965); United States v. Calabro, 449 F.2d 885 (2 Cir. 1972) cert. den. 410 U.S. 926 (1973). It is further submitted that whatever the defendant's guilt may have been in connection with narcotics activity, he was a small operator in connection with any of the various conspiracies sought to be proven by the government below. Because, however, Dawson testified that Wesley rode to New York and New Jersey with him to meet the two Pannirellos in 1971 and early 1972, and offered his (Wesley's) apartment in Landover, Maryland as a place to reprocess and cut the heroin obtained,[8] the jury found him guilty of the conspiracy and one substantive count. Despite Dawson's similar testimony concerning a trip to New York with

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8. Apropos of the contention of defendant Wesley that there was no one situs or headquarters of the conspiracy, Wesley's apartment was one of many places where the conspirators -- in completely different teams and on different occasions -- cut heroin. Other places mentioned where this occurred and unconnected to Wesley were Ernestine Barber's apartment in New York, Basil Hansen's apartment in New York, Cecil Tate's apartment in Washington, Pinky Miller's apartment in Maryland.

Wesley in August 1971 (Count IV), the jury inconsistently found Wesley not guilty on that count.

Defense counsel for Wesley further underlined the confusion attached to the conspiracy evidence against him by a motion to strike the testimony of the other co-conspirators concerning Wesley, and her request for an express finding under United States v. Geaney, 417 F.2d 1116, 1120, 1121 (2 Cir. 1969) that there was or was not sufficient connection of Wesley to some of the conspiracies established by non-hearsay evidence. The court made no finding but refused to strike the evidence upon specific request (TR 3108, JA-437). Exception was taken to the charge on this ground as well (TR 4189, JA-87).

POINT III

THE PROSECUTOR OVERSTEPPED THE BOUNDS OF PROPRIETY ON TWO OCCASIONS WHICH UNDER ALL THE CIRCUMSTANCES OF THIS CASE WERE PREJUDICIAL TO THE DEFENDANT WESLEY; TIMELY MOTIONS FOR MISTRIAL WERE DENIED.

On two separate occasions, in violation of the court's ground rules which were to avoid as much as was possible under the circumstances "spill over" and guilt by association of the defendants -- one to the other -- the government prosecutors deliberately asked improper questions of prosecution witnesses.

The first occasion was when co-conspirator Dorothea Ann Ellis was testifying and the prosecutor asked her "Did you enter a witness protection program?" (TR 1312, 1313, JA-392,393). There was objection to this and the court admonished counsel and there was no answer to the question. It was enough, however, to suggest

to the jury that she had entered such a program. It was particularly prejudicial because Miss Ellis herself was a small, slight, helpless-appearing person who could not apparently speak above a whisper. The suggestion was then telegraphed to the jury that the defendants en masse were threatening her for testifying against them. The motion for mistrial was denied (TR 1381, JA-394).

A second incident involving the same witness concerned a question as to the incarceration in prison of one of the alleged co-conspirators -- Paul Gregario. The court had ruled that this was not to come out. Nonetheless, in order to establish that Gregario was incarcerated, the prosecutor asked: "Where did Paul Gregario go?" The witness responded: "He was in jail." (TR 1436, JA-395). A second motion for mistrial was denied (TR 1438, 1448, JA397, 398).

Under the rules set forth in Berger v. United States, 295 U.S. 78, 88 (1935), the prosecutor acted improperly below. Said the Supreme Court in Vierich v. United States, 318 U.S. 236, 248 (1942):

> "It is as much his [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The court below was aware of the gravity of the impropriety which must be assessed by this Court against the background of the dragnet nature of the criminal conspiracy charges and evidence (TR 1448, 1449, JA-398). United States v. De Loach, 504 F.2d 185 (CADC 1974); United States v. Achtenberg, 459 F.2d 91 (3 Cir. 1972); United States v. La Sorsa, 480 F.2d 522, 525, 526 (2 Cir. 1973);

United States v. Fernandez, 480 F.2d 726, 741n (2 Cir. 1973); United States v. White, 486 F.2d 204 (2 Cir. 1973); United States v. Drummond, 481 F.2d 62 (2 Cir. 1973); United States v. Miller, 478 F.2d 1315 (2 Cir. 1973). Cf. United States v. Briggs, 457 F.2d 908 (2 Cir. 1972).

This prejudicial conduct on the part of the prosecutor, added to the other error, requires reversal of defendants' convictions.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION AND IRREVERSIBLY PREJUDICED THE DEFENDANT WESLEY'S CASE IN PERMITTING REPEATED QUESTIONS OF THOMAS DAWSON, AN ALLEGED CO-CONSPIRATOR, ON THE ISSUE OF WHETHER OR NOT HE HAD AN ILLEGAL AGREEMENT WITH THE DEFENDANT. THAT ISSUE WAS AN ULTIMATE ISSUE FOR THE JURY TO FIND IN DECIDING TO CONVICT OR ACQUIT THE DEFENDANT OF CONSPIRACY TO VIOLATE THE NARCOTICS LAW.

The first question asking for a conclusion was asked by the prosecution of Thomas Dawson:

> "At this time did you have an agreement as to the price of narcotics that you would sell in Washington?" (TR 182, JA-373)

An objection was taken because the question requested a conclusion and as to form. The court intervened to rephrase the question:

> "Did you have an agreement with anyone?" (TR 183, JA-374)

After counsel for defendant again objected and the court overruled the objection, the court took a recess and requested counsel for defendant Wesley along with four other counsel to come into Chambers.

On the record, on his return Judge Duffy asked Mrs. Piel, Wesley's counsel:

> "Ms. Piel, do you persist in your objection at this time?" (TR 185, JA-376)

For whatever reason, not disclosed in the record, Mrs. Piel stated, "I will withdraw it." (TR 185, JA-376), and questions were put to Dawson in conclusory form concerning the agreement. Dawson said there was an agreement between Warren, Wesley (Folks) and himself but was never able to say what the agreement was (TR 185, 186, JA-376, 377).

The following day, Mrs. Piel renewed her objection, withdrew her prior withdrawal of the objection, and moved to strike the testimony of Dawson reflecting his conclusions about an agreement (TR 214, 215, JA-379, 380). The court did not rule but permitted instead, over objection, the same questions concerning the agreement to again be put to Dawson (TR 262-267, JA-381-384).

The effect of this repeated improper questioning was to assure the conviction of defendant Wesley on the conspiracy count. It is almost hornbook law that the questioning of any witness about an agreement instead of asking for the conversation is improper direct examination. To this effect is McCormick on Evidence (1954) on the Opinion Rule (The Evolution of the Rule against Opinion):

> ". . . it seems the principal impact of the rule is upon the form of examination. The questions while they cannot suggest the particular details desired, else they will be leading, must nevertheless call for the most specific account that the witness can give. For example, he must not be asked, 'Did they agree?' but 'What did they say?'" (p. 25) (emphasis supplied)

This Court has had occasion to approve the rule that asking for conclusions of a witness or subjective impressions of any kind is not favored. United States v. Petrone, 185 F.2d 334, 336 (2 Cir. 1950). The general rule was enunciated by a District Court in California in United States v. Schneiderman, 106 F.Supp. 982, 983 (ND Cal. 1952) rev. on other grds sub nom Yates v. United States, 354 U.S. 298 (1957):

> "The general rule is that if the facts underlying the conclusion may be easily stated and as stated will accurately reproduce to the jury what the witness has observed, then the conclusion should not be allowed."

In the case at bar any agreement between Dawson and the defendant should have been brought out by specific questions about their conversations. Dawson's veracity in general was severely impugned on extensive cross-examination. There may well never have been any agreement at all. Dawson did not seem to remember the conversations. In the absence of the improper question there might not have been sufficient evidence to convict the defendant Wesley on Count I.

It is true that the issue has been held to be a matter for the discretion of the trial judge. See Petrone, supra. But in this instance the repeated questioning of Dawson about his conclusion about the existence of a conspiracy, joined with other error, was prejudicial indeed.

POINT V

DEFENDANT WESLEY WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT HIS TRIAL IN VIOLATION OF F.R.C.P. 43; THROUGH NO FAULT OF HIS OWN HE WAS DETAINED BY FEDERAL OFFICIALS IN WASHINGTON, D.C. AND MARYLAND FOR A PERIOD OF THREE DAYS WHILE THE TRIAL PROCEEDED; UPON HIS RETURN ON A WRIT OF HABEAS CORPUS HE REFUSED TO WAIVE HIS RIGHT TO BE PRESENT. IN ADDITION THE COURT CONFERRED PRIVATELY WITH INDIVIDUAL JURORS DURING THE JURY'S DELIBERATIONS OUT OF THE PRESENCE OF DEFENDANT WESLEY OR HIS COUNSEL.

The right of a person accused of crime to be in attendance and present at all stages of his trial has been recognized as part of fundamental due process -- scarcely less important to the accused than the right of trial itself. The right was recognized in the common law and is inherent in the Sixth Amendment right to confrontation of witnesses. It has been codified in the first part of Rule 43 of the Federal Rules of Criminal Procedure which requires the presence of the defendant at arraignment at every step of the trial including the impaneling of the jury and at sentencing (unless otherwise provided). Although the rule recognizes that a defendant may voluntarily absent himself from the trial, the record must be clear that the specific absence was voluntary.

In this case on several occasions the defendant Wesley did absent himself voluntarily from the proceedings[9] and on such

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9. His mother became ill and subsequently died during the more than two month trial. Also he, himself, was ill as were a number of defendants (TR 385, 586, 803; JA-385, 386, 388).

occasions he waived his right to be present.

On March 7, 1976, however, he had returned to Washington, D.C. where he lived and there he was arrested by federal officials. This fact was related to the trial court on the following Monday (March 9, 1976) (TR 2332, 2333; JA-407, 408). Trial counsel made clear to the court that, as appointed counsel, she could not waive his appearance. The court proceeded with the trial (TR 2333, JA-408). When the absence extended for more than one day, counsel protested the situation (TR 2571, 2572, 2618; JA-411, 412, 413). The arrest and detention of the defendant was evidently unauthorized and a mistake (TR 2697-2701; JA-419-423). The court and prosecution offered to recall witnesses who appeared in the defendant's absence (TR 2482, 2701-2703; JA-410, 423, 428). The defendant, however, did not request the recall of any witnesses, but did not waive his right to be present (TR 3459, JA 438).

There is no question but that in the instant case the absence of the defendant was involuntary and not deliberate. Cf. United States v. Tortora, 464 F.2d 1202 (2 Cir. 1972) cert. den. 409 U.S. 1063; Cureton v. United States, 396 F.2d 761 (CADC 1968); United States v. McPherson, 421 F.2d 1127 (CADC 1969); United States v. Taylor, 414 U.S. 17 (1973).

Two federal courts in other jurisdictions have deemed as pivotal to their consideration the fact that the defendant was in the physical custody of the government at the time of his absence from a stage of the trial. In each case the defendant's right to be present was upheld. Evans v. United States, 274 F.2d

393 (6 Cir. 1960); Cross v. United States, 325 F.2d 629 (CADC 1963); cf. Lewis v. United States, 146 U.S. 370 (1892); but see Snyder v. Massachusetts, 291 U.S. 97, 106 (1938).

A case which is particularly close in its facts to the case at bar and which arose in this Circuit is United States v. Crutcher, 405 F.2d 239 (2 Cir. 1968) cert. den. 394 U.S. 908. In Crutcher, the defendant had been arrested in another jurisdiction and the government asserted that he had voluntarily waived his right to be present. This Court rejected the government's argument and held that under those circumstances the defendant's right to be present had been violated. Cf. United States v. Johnson, 129 F.2d 954, 958 (3 Cir. 1942) affd. 318 U.S. 189 (1943). Said the Court in Crutcher:

> "Indeed, there is authority for the proposition that a defendant in custody does not have the power to waive his right to be present. See Diaz v. United States, 223 U.S. at 455, 32 S.Ct. 250 (dictum); Cross v. United States, 117 U.S.App.D.C. 56, 325 F.2d 629 (1963); Evans v. United States, supra; 8 Moore, Federal Practice § 43.02[2] (1968).
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> * * * * *
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> ". . . Compare Parker v. United States, 184 F.2d 488 (4th Cir. 1954) where five witnesses testified in defendant's absence and waiver was found from the fact that the defendant read the transcript of their testimony and from the lack of an objection or a request that they be recalled." (pp. 242-244)

There is no question that the defendant Wesley made known his objection to the trial proceeding in his absence while he was involuntarily incarcerated (TR 3459, JA-438). It is also clear that he expressly did not waive his presence. Stegall v. United States, 259 F.2d 83 (6 Cir. 1958). Cf. Parker v. United States,

184 F.2d 488 (4 Cir. 1950).

Defendant Wesley's right to be present at all stages of the proceedings was further compromised by the court communicating with at least one juror privately during the jury deliberations which lasted for five days. What was said was later, according to the court, placed upon the record outside of the presence of defense counsel and then sealed (TR 4299-4305, 4333; JA-181-188). Defense counsel protested the communication and the procedure, in vain. The Supreme Court had had recent occasion in Rogers v. United States, 422 U.S. 35 (1975) to reaffirm the right of a defendant to be present at all stages of the proceedings. There the court reversed a defendant's conviction because of proceedings out of his presence even though he did not raise the issue at either the trial or the appellate level.

Defendant Wesley is entitled to a reversal of his conviction on this ground alone.

POINT VI

DEFENDANT WESLEY WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL FOR THE FOREGOING REASONS AND ON ALL THE GROUNDS APPLICABLE TO HIM RAISED BY CO-COUNSEL.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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2 Copies Received

Date 9/3/76

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